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File No. O · Negotiable Instruments / 42

Legal DEPARTMENT

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Subject:—

Opinions under the

Negotiable Instruments

Act 1881

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C O N T E N T S.

Legal Department Vol. O.Negotiable Instruments Act. / 1941.

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Submitted.

2. These papers relate to the general question before this Govt. of incorporating High Court Funds in the public account. In para. 5 of the Govt. of India, Finance Deptt. letter dated 15-7-42, the Govt. of India suggested to this Govt. that if there was no rule at present directing that the funds in the hands of the Official Trustee and the Administrator General should be held in the public account, it would be advisable to make such a rule under section 30(2)(b) of the Official Trustees Act, 1913 and section 50(2)(b) of the Administrator General's Act, 1913, in order to ensure that these funds do not escape inclusion in that Account. So far as the cash balances in the hands of the Administrator General and Official Trustee are concerned, they are already included in the Public Account with Govt. The only question therefore is as regards the securities held in the hands of these officers. These securities are at present lodged with the Imperial Bank of India (vide Rule 11 of the O.T.'s Rules and Rule 22 of the A.G.'s Rules read with the definition of 'Bank' in the said Rules). With a view to include these securities in the public account, it was suggested that these securities should be lodged with the Reserve Bank of India. Govt. therefore consulted the Administrator General and Official Trustee in the matter on the question whether there were any technical reasons against the proposed

transfer of securities to the Reserve Bank. The two legal objections raised by the Adm. General and Official Trustee are:-

(1) In order to entrust the securities to the Reserve Bank, they will have to be transferred to and endorsed in the name of the Bank. Such transfers and endorsements would amount to the Adm. General and Official Trustee divesting himself of and parting with the title of the property entrusted to his care and such a course would in his opinion, be a serious breach of trust and is not permitted under the law.

(2) There is also another legal difficulty to the delegation by the trustee of his duties to a third party for the sale or purphase of securities. The Reserve Bank engages its own brokers which under the law cannot be allowed to be done by the Adm. General and Official Trustee.

3. ~~(3)~~ Rule 11 of the Official Trustees (B'bay) Rules, 1922 and Rule 22 of the Administrator General's (Bibay) Rules, 1922 inter alia provide that all Govt. Securities ~~coming into~~ vesting in the Official Trustee and coming into his possession and all Govt. Securities coming into the possession of the Adm. General shall be lodged by him in the Bank for safe custody. 'Bank' has been defined in Rule 2(3) of both the sets of Rules to mean the Imperial Bank of India, Bombay. This definition will have to be amended if such securities are to be lodg-ed for safe custody with the Reserve Bank of India. But even after that, as pointed out by the Adm. General and Official Trustee, Bombay, there

-* The R.L.A. is requested to give his opinion on the legal objections raised by the Adm. General and Official Trustee.

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would be further difficulty about the necessity of endorsing the securities in favour of the Reserve Bank. Under para. 101(b) (ii) of the Securities Manual, the securities will have to be endorsed in favour of the Bank as follows: 'Pay to the Reserve Ban of India'. The Adm-General and Official Trustee states that there would be a serious breach of trust if the trustees thus divest the title to the property kept under their care. It is however clear from para. 101(b)(ii) that the securities are transferred for safe custody and by the endorsement there will be no transfer of the ownership of the property. And the Reserve Bank will be holding the scrips in a fiduciary character (see section 94 of in Indian Trusts Act. 1882. If the Bank is willing to give a certificate as suggested by F.D. (p. 682 ante) that the scrip is being held by the Reserve Bank for purposes of safe custody only, there will not be any legal objection to lodge the securities with the Reserve Bank, It would however be advisable to consult the Bank before passing any definite orders in the matter.

Under section 17(11)(b) of the Reserve Bank of India Act, 1934, the Bank is authorised to act as agent for the Provincial Govt. in the transaction of business of the purchase, sale, transfer and custody of securities. The question therefore is whether a trustee can delegate his power to an agent. It is true that trusteeship is an office of personal confidence but the rule has been long established that trustees are not bound personally to

transact such business connected or arising out of the proper duties of their trust, as, according to the usual mode of conducting business of a like nature, persons acting with reasonable care and prudence on their own account would ordinarily conduct through agents. (See p. 186 of Lewin on Trusts-14th Edn.) A trustee however cannot divest himself of the trust fund but there would be no objection if he employs an agent for safe custody, sale or purchase of securities. As regards objection (2) it has been pointed out by F.D. (p. 586) that under para. 106 of the Securities Manual it is not incumbent on the officer conderned to effect the sale through the agency of the Reserve Bank. The securities deposited with the Administrator General are however excepted from the applicationof provisions of Chapter IX of the Securities Manual (see exception 2 to para. 99(a)). Govt. can therefore take up this question with the Bank and decide as to the exact action to be taken to achieve the proposed object.

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S.A.S.
Under the Official Trustee's Rules 1922 and Administrator General's Rules, 1922 the securities the face value of which amounts to over Rs. 21 crores at present held by the official Trustee and the Administrator General are deposited with the Imperial Bank of India , Bombay for safe custody . The Imperial Bank charge commission for safe

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custody and collection of interest on the securities of the Oriental Trust; and to avoid payment of commission for collection of interest on other securities, a clerk is deputed temporarily withdrawing the scrip from the custody of the Bank and returning the same to the Bank after collecting interest thereon from the public debt office. As this was neither a safe nor a satisfactory arrangement it was suggested by F.D. to H.D. to consider the desirability of entrusting the custody of and collection of interest on these securities to the Reserve Bank of India to whom all other officers of Govt. entrust the securities coming into their possession either as security for the performance of some contract or in trust for some or quasi-public purpose or on behalf of Govt. or the safe custody on behalf of members of the public . H.D. consulted the Administrator General and Official Trustee both of whom have objected to the proposal on the following grounds:-

(1) In order to entrust the securities to the Reserve Bank they will have to be transferred to and endorsed to the Bank. Such transfers or endorsements would amount to the Administrator General and the Official Trustee divesting himself of and parting with the title to the properties entrusted to his care and would be a serious breach of trust.

The R.L.A. is requested to give his opinion on the aforesaid objection of the Administrator General and the Official Trustee.

Clause (b) of sub-section (2) of sections

30 of the Official Trustees Act, 1913 and clause (b) of sub-section (2) of section 50 of the Administrator General's Act, 1913 provide for power of Govt. to make rules for the safe custody and deposit of the funds and securities which come into the hands of the official Trustee and the Administrator General. All Govt. securities vesting in the Official Trustee and the Administrator General and coming into their possession are required to be lodged by them as soon as practicable in the Bank for safe custody. (See rule 11 of the Official Trustees' (Bombay) Rules, 1922 and rule 22 of the Administrator General's (Bombay) Rules, 1922). "Bank " as defined in rule 2(3) of both the sets of Rules means the Imperial Bank of India. Consequently if the definition of the Bank in rule 2(3) is changed to mean the Reserve Bank of India, there would be no legal objection to the Official Trustee and the Administrator General depositing securities with the Reserve Bank of India for safe custody.

Under section 17(9) of the Reserve Bank of India Act, 1933, the Bank is authorized to carry on and transact the business relating to the custody of securities and the collection of the proceeds, whether principal interest or dividend of any such securities, The holder of a Govt. security or the indorsee is alone entitled to claim dividend on such security and under section 3(1) of the Indian Securities Act, 1920 save as otherwise provided in or under this Act no notice of any trust in respect of any Govt. security shall be receivable by Govt.

consequently if the Reserve Bank has to collect dividend on securities deposited with it, it can do so only when the securities are indorsed in its favour by the holder i.e. the Official Trustee or the Administrator General as the case may be.

The main question for consideration therefore is whether it would be competent for the official Trustee and the Administrator General to indorse the securities to the Reserve Bank for the Collection of dividend.

Under section 6 of the Official Trustees Act, the Official Trustee is a corporation sole by the name of the Official Trustee of the Division for which he is appointed. Similarly under section 6 of the Administrator General's Act the Administrator General is a corporation sole by the name of the Administrator General of the Division for which he is appointed . Consequently the rights and liabilities of the official Trustee and the Administrator General would be governed by the provisions of the respective Act and the rules thereunder. Under section 30(2)(b) of the Official Trustees Act and section 50(2)(b) of the Administrator General 's Act power is given to Govt. to make rules providing for safe custody, deposit and investment of assets and securities. Consequently in the absence of any provision in these Acts or Rule providing for collection of dividend securities for collection of dividend securities to Bank with which they are deposited for safe custody, can be validly made. The effect of an indorsement is to trans-fer the property in the investment to the transferee .

and under section 6 of the Transfer of Property all the legal incidents of such property are transferred. Such incidents include inter alia where the property is a debt or actionable claim, the securities therefor (See Bhashyam's Negotiable Instruments Act p. 108). It is therefore clear that by indorsement of the securities to the Reserve Bank the Official Trustee and the Administrator General would be divested of their rights to such securities involving a breach of trust. It is true that the Reserve Bank would after indorsement be holding the securities as a constructive trustee (see section 94 of the Indian Trusts Act, 1882); but no notice of trust can be received by Govt. in respect of such security under section 3(1) of the Indian Securities Act. It appears that under the English Trustees Act, 1925 a trustee may unless expressly prohibited by the trust instrument, retain or invest in bearer securities payable to bearer which if not so payable would have been authorized investments; and bearer securities so retained or taken must until sale be deposited for safe custody and collection of income with a bank unless the Trustees include a trust corporation (see Halsbury's Laws of England Vol. XXXIII p. 243). The principle underlying the provision appears to be one of general application. As stated above the Official Trustee and the Administrator General are a corporation sole. (It is for this reason it appears that the securities deposited with the Administrator General are excluded from the provisions of ch. IX of the Govt. Securities Manual. However all these provisions do not appear to be statutory). Consequently it

it appears that in the absence of any statutory provision the indorsement of scrips to the Reserve Bank of India by the Official Trustee and the Administrator General would not be warranted and the objection taken by them appears to be valid.

Sd/- R.T.K.

6/6

Submitted. R.I.No. 10619/15-10-42

Please see this office notes at pp. 601-609 ante.

2. To the queries raised by the A.L.R. R.L.A. at page 611 ante, the F.D. has sent the following answers:—

(1) The practice is that before lodging the securities with the Reserve Bank, they are to be endorsed in the name of the Bank for facilitating the collection of interest The form of such endorsement is "Pay to the Manager, Reserve Bank of India or order" (see para. 47 of the Government Securities Manual and F.D. note at p. 588 ante).

(2) The securities to be deposited with the Reserve Bank of India will be all Government Promissory notes and stock certificates.

(3) Government securities are negotiable instruments and the title thereto is transferred immediately on endorsement of the securities in favour of third parties. As regards stock certificates also, the signing of such an assignment is in law a complete transfer of ownership to the transferee (see Administrator General's letter at p. 593 ante).

3. The R.L.A. is requested to examine the objections raised by the Administrator General.

4. Government promissory notes fall within the definition of "Promissory note" in section 4 of the Negotiable Instruments Act, 1881

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(see para. 2 of p. 48 of the Negotiable Instruments Act by Bhashyam and Adiga 7th Edn). They are in a negotiable form but their indorsement, the liability of the indorsee and their renewal are regulated by a Special Act, viz. the Indian Securities Act, 1920 (ibid). Under the Negotiable Instruments Act, the effect of an indorsement is only to transfer the property in the instrument to the transferee but under section 8 of the Transfer of Property Act, all the legal incidents of such property are transferred (p. 105 ibid). Under section 2(a) of the Indian Securities Act, 1920, Government security includes promissory notes and stock certificates. Section 3(1) of the said Act provides that save as otherwise provided in or under this Act, no notice of any trust in respect of any Government security shall be receivable by Government. Sub-section (2) of section 3 provides that the Government shall not be deemed to have received notice of any trust by reason only of the fact that it has recognised an indorsement of a Government security by an executor or Administrator as such, nor shall it inquire into the terms of any will by which such executor or administrator may be bound, but, on being satisfied of the due appointment of such executor or administrator it shall be entitled to treat him as the full owner of any Government security belonging to the estate of the person whom he represents. Section 5 provides that notwithstanding anything in the Negotiable Instruments Act, 1881, a person

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shall not , by reason only of his having indorsed a Government security, be liable to pay any money due either as principal or as interest thereunder. The indorsement will however have the same effect and will result in the transfer of title (Pl. also see section 24(3) of the Indian Securities Act, 1920). Under para. 101(b)(ii) the endorsement to be made is as follows:-

"Pay to the Reserve Bank of India."

Para. 101(b)(ii) makes it clear that the deposit is for safe custody but that will not alter the legal position resulting after indorsement. Para. 99(a)(2) makes an exception in respect of securities deposited with the Administrator General from the application of Chapter IX. It therefore seems that if Government want that the Administrator General and the Official Trustee should deposit the securities with the Reserve Bank, specific provision to that effect and to meet the Administrator General's objections will have to be made in the Administrator General's Act, 1913 and the Official Trustees Act, 1913 by amending the Act.

Sd/- S.R.Potnis

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S.A.S. Attention is invited to my previous note dated 6-6-1942. I have nothing more to add to it.

R.T.K.
Sd/- 17/11

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Office of the R.L.A.

At present according to the Official Trustees Rules and the Administrator General's Rules, 1922 the securities held by them are to be kept in the custody of the Imperial Bank of India, Bombay. The Imperial Bank charges commission for safe custody and collection of interest on the securities of the Oriental Trust and to avoid payment of commission for the collection of interest on other securities a clerk is deputed temporarily for withdrawing the scrip from the custody of the Bank and returning the same to the Bank after claiming and collecting interest from the Public Debt Office. As this was neither a safe nor a satisfactory arrangement it was suggested by F.D. to H.D. to consider the desirability of entrusting the custody of and the collection of interest on these securities to the Reserve Bank of India to whom all other officers of Government entrust the securities coming into their possession either as security for the performance of some contract or in trust for some public or quasipublic purpose or on behalf of Government or in safe custody on behalf of the employers of the public. The H.D. consulted the Administrator General and Official Trustee who has raised the following objection to the proposal:

"In order to entrust the securities to the Reserve Bank for the collection of interest they will have to be transferred to him and indorsed in the name of the Bank Such transfers would amount to the Administrator General and Official Trustee divesting himself and parting with the title to the properties entrusted to his care and would be a serious breach of duty."

3. The R.L.A. is requested to state whether the objection raised by the Administrator General and Official Trustees is valid.

Clause (b) of sub-section (1) of section 30 of the Official Trustees Act, 1913, and clause (b) of sub-section (2) of section 50 of the Administrator Generals Act, 1913

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give Government the power

to make rules for the safe custody and deposit of the funds and secutities which come into the hands of the Administrator General and Official Trustee. All Government secutities vesting in the Official Trustee and Administrator General and coming into their possessi n are required to be lodged by them as so n as practicable in the Bank for safe custody (see rule 11 of the Official Trustees (Bombay) Rules, 192. and rule 22 of th Administrator General (Bombay) Rules, 1922). "Bank" as defined in rule 2(3) of these Rules means the Imperial Bank of India. Consequently to enable the Administrator General and Official Trustee to entrust the secutities in their possession to the Reserve of Bank of India for safe custody rule 2(3) will have to be amended. Such amendment would remove one legal objection to the Administrator General and Official Trustees transferring the secutities to the Reserve Bank of India of safe cu-stody.

4. The next question for consideration is whether it would be necessary for the Administrator General and Official Trustee to indorse these securities in favour of the Reserve Bank for collection of interest and whether such indorsement would be a breach of their duties.

It appears that the Government secutities held by the Administrator General and Official Trustee are of two kinds: (1) stock certificates and (2) Government Promissory notes.

"Interest on stock certificates is paid on warrants issued by the Public Debt Office of whose book the stock certificate is registered for the time being and payable at the local office of the Reserve Bank of India. If so desired by the proprietor of the stock, the interest warrants will be made payable at any other Indian office of the Reserve Bank of India. The presentation of the stock certificate is not required at the time of either the issue of interest warrants or their encashment. Ordinarily, interest warrants will be sent direct to the place at which they are mm made payable, but if if payable at a sub-treasury they will be sent to the treasury to which such

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sub/treasury is subordinate. If, however, the proprietor so prefers his warrants will be sent by post to himself or to his bank or agent, at any address desired, on his intimating in time the necessary particulars to the Public Debt Office concerned "(see Government Securities Manual pp. 29.30, 31). So far as these rules show, it seems that in the case of stock certificates entrust d to the Reserve Bank of India for safe custody there would arise no question of indorsing them for purpose of collection of interest. Consequently the difficulty ty apprehended by the Administrator General and Official Trustee would not arise in the case of the stock ce tificates.

5. In the case of Government Promissory Notes interest can be made payable (a) at the office of the Reserve Bank of India at a place where a Public Debt Office is situated or at any treasury or sub-treasury. In such cases enforcements are made lengthwise across the face of the note to the effect that interest is payable at the place named and when such an enfacement has been made, the holder can obtain payment of interest at that place upon presentation of note (see Government Securities Manual p. 36). It appears therefore that the indorsement of Government Promissory Notes in favour of the Reserve Bank of India would be necessary to enable it to collect interest on them for the Administrator General and official Trustee. However the Official Trustee's view that indorsement would amount to divestment of title does not in the circumstances appear to be correct. Ordinarily indorsement and delivery would amount to divestment of title. But that is not necessarily so. The intention to pass the property in the bill or note is essential to make the delivery effectual, for in the words of Maule J:

"The liability of an indorser to his immediate indorse arises out of the contract between them; and this contract in no case consists exclusively in the writing popularly called an 'indorsement' which is indeed necessary for the contract in questi n; but that contract arises out of the written

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in dorsement itself, the deliv ry of the bill to the indorsee, and the intention with which the delivery was made and accepted as evinced by words spoken or written by the parties, and the circumstances (such as the usage of the place, the course of dealing between the parties and their respective situations) under which the delivery to k place" ((1836) 10 Moo. p.C. 94 at 108).

It would be cl ar from the respective situations of the parties in this case that there was no intention to transfer ownership .

6. Under section 46 of the Act, it may be shown that the bill was delivered to the payee, or that a bill was indorsed to the indorsee to take effect on certain conditi ns being complied with or for a special purpose Delivery with the intention of passing the property in the instrument to the person to wh m it is delivered is essential to complete any contract on a negotiable instrument whether it be a contract of making, indorsement of acceptance. Mer delivery without the intention of pas ing the property is not sufficient to constitute a complete contract. (pp. 178-179 of Lal's Law of Hundis and negotiable Instruments). In this connection attention is invited to observati ns in para raph 1336 at p. 916 of Vol. I of Halsbury's Laws of England.

7. Under section 50, the indorsement of a negotiable instrument followed by the delivery transfers to the indorsee the property therein with the right of further negotiation; but the indorsement may, by express wor ls restrict or exclude such ri ht, or may merely constitute the indorsee and agent to indorse the instrument or to receive its contents for the indorser or for some other pecified person (cf. secti n 35 (1) of the Bills of Exchange Ac t 1882). Under this section, indorsement alone does not vest the property in the instrument to th transferee; in order to have that effect, the indorsement must be followed by the delivery, and section 46 provides that it may be shown that such delivery was made conditionally or for a special purpose only.

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and not for transferring absolutely the property therein. This restriction in the title of the transferee may also be by express words in the indorsemtn itself (pp. 292-293 of Negotiable Instruments Act by Bhashyam and Adiga). In view of the legal position stated above, the endorsements made by the Official Trustee under paragraph 101(b)(ii) on securities deposited with the Reserve Bank of India for safe custody would not amount to transerring absolute property in the securities. It thus appears that in the case of stock certificates indorsement is not necessary. But even indorsement, where necessary, does not present an insuperable legal bar to the deposit. To meet the difficulty, if any, the indorsement may be made restrictive e.g. only for the purpose of collecting interest and if the Securities Manual does not at present permit of such endorsement, endorsements, it may be suitably amended. A second alternative would be to execute a legal document showing that the securities were deposited merely for collection of interest. A power of Attorney executed by the Administrator General and Official Trustee in favour of the Reserve Bank limiting its power to the collection of interest might serve the purpose. In any case the legal difficulties raised by the proposed deposit do not seem at all insuperable.

The method of meeting the difficulties may be settled in consultation with the Reserve Bank and the Officers concerned.

Sd/- P.N.M.

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Remembrancer of Legal Affairs.

U.H. to M.D. No. 9990 dated the 15 th December 1942.

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